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Pathmanabhan a/l Nalliannen & Ors v Public Prosecutor

B

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NOS 45A-53, 54, 55, 56 OF 2011
AKHTAR TAHIR J
26 JUNE 2013

C

Criminal Law — Murder — Appeal — Common intention — Four victims headed to Banting and did not return — Police investigation led to final destination of victims — DNA profiles found on various spots and sites — Four accused convicted of common intention to murder — First accused had interest in one of victim's lands — Whether first accused had intention and reason to kill — Testimoni of family members — Whether credible — Whether telecommunication records accurate — Forensic and medical evidence — Whether evidences adduced led to irresistible conclusion that all four accused killed four victims — Penal Code ss 34 & 302

D

E

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appeal from magistrate's court — Whether prima facie case established — Diversity of evidence between all four accused — Whether testimonies of all four accused consistent with one another — Whether there was common intention to kill — Whether evidences adduced led to irresistible conclusion that all four accused killed victims — Whether conviction and sentence safe — Penal Code ss 24 & 302

F

The four accused were charged with four charges under s 302 of the Penal Code ('Code') read together with s 34 of the Code for the offence of common intention of murder of four people, namely, Sosilawati bt Lawiya, Ahmad Kamil bin Abdul Karim, Noorhisham bin Mohamad and Kamaruddin bin Shamsuddin ('Sosilawati and company'). On the night of the tragedy, there were various conversations between Sosilawati and company with their family and friends, all alluding to the fact that they were going towards Banting. Investigations by the police led to the final destination of Sosilawati and company which was a farm belonging to the first accused. Based on testimonies of several witnesses, the police discovered burnt logs which were thrown at a rubbish dump not far away from the farm, burnt zinc sheets and a cricket bat of which contained traces of blood. The DNA on the cricket bat and swabs from the wall in the farm were found to match that of the immediate family members of Sosilawati and company. The prosecution was found to have proven a prima facie case through a combination of surrounding evidence in the form of testimoni of family members, telecommunication records, testimoni of credible witnesses helped by the inferences made from the conduct of the accused in the discovery of exhibits as well as forensic and medical

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I

evidence. Subsequently, the four accused were called to enter defence. The first accused admitted that the farm belonged to him but he was not present at the farm on that night to meet Sosilawati and company. The first accused stated that on that night, he had gone to his mother's house as well as had gone with an estate agent to view some land. The first accused confirmed that he was the lawyer for Sosilawati in a land transaction in Penang and that he also had an interest in the purchase of the land having taken out money. He also was the lawyer for another company belonging to Rahman Palil for the same piece of land and had also an interest in the this land transaction. The second and third accused testified that they were on the farm on that night and both confirmed that the first accused was the owner of the farm although their dealings were mostly with the fourth accused who paid their salary and supervised and directed their work on the farm. Both the accused testified that the first accused did not come to the farm on that night. The first and second accused further testified that together with the fourth accused and two others, they did gather at the farm around midnight to celebrate Merdeka. After the celebration they ate and slept till the next morning. The fourth accused gave testimoni that he stayed on the farm which belonged to the first accused and his role on the farm was however limited to construction work on the farm. According to the fourth accused, Sosilawati and company did come to the farm to meet the first accused and on that night, he had heard a quarrel in one of the premises and when he went in to see what it was, he saw Sosilawati's driver and lawyer being beaten. The fourth accused also heard the first accused giving instructions to the second and third accused to kill the driver and the lawyer. Finally he saw Sosilawati and company with a few others being bundled to the neighbouring farm. The next morning he saw the persons bundled to the neighbouring farm being brought back to the farm by the second and third accused. On the farm, he witnessed the three person accompanying Sosilawati being burnt on an arrangement of logs. The fourth accused also testified that the first accused had made attempts to cajole him to accept what had happened and asked him and the second and third accused to keep silent on the matter. The first accused also prepared them to face a possible arrest by the police and indicated that they could co-operate with the police as later they could retract from any statement to the police by claiming that they had made the statement under force.

Held, dismissing the appeal:

(1) It was glaringly obvious that the defence of the accused was not untied especially between the first three accused and the fourth accused. In the face of such diversity between the evidence of the accused, the court could choose to disbelieve the evidence of all the accused and accept the version of the prosecution. The defence sought to explain this diversity in evidence to the fact there was a fall out between the first accused and the fourth accused when the first accused had rejected a request of help from the fourth accused. This could be true but it still did not explain the

diversity in evidence bearing in mind especially that some portion of the evidence of the fourth accused was consistent with the prosecution's evidence. The court chose to disbelieve the evidence of the first three accused that nothing transpired on the farm on the night in relation to Sosilawati and company. The court further made an affirmative finding of fact that Sosilawati and company were on the farm and that all the four accused did meet Sosilawati and company on the farm that night (see paras 223, 228–229).

(2) As against the fourth accused, the court chose to believe that portion of his evidence which was consistent with the prosecution's evidence. This included the prosecution's evidence on the coming of Sosilawati and company on the farm, the fire being lit on the farm to burn at least three members of Sosilawati and company and members of Sosilawati and company being beaten on the farm on that night. The evidence of the fourth accused deserved a separate evaluation as it brought out a version that was different from either the defence or prosecution's version. The evidence of the fourth accused was crafted to portray his innocence and distance him from all the criminal activities which he said happened on the farm. The fourth accused had manipulated the evidence to suit his own case. The fourth accused was present during the major part of these proceedings and had listened to the evidence of the various witnesses. It was not difficult for him to tailor his own evidence to his favour. Further, being a co-accused, it would be to his advantage to incriminate the others to save his own skin (see paras 228–232).

(3) The entire evidence that this group of people were bundled off by the first to third accused to the neighbouring farm was itself unbelievable as certainly such a big group could not have been kept overnight without attracting any attention. Further the police investigation did not show any involvement of the neighbouring farm. The evidence of this group of people to the neighbouring farm was an invention of the fourth accused and a way out of incriminating himself from the events occurring on the farm (see paras 233, 235–236).

(4) The first accused gave no explanation that the family members were mistaken or telling lies when testifying that Sosilawati and company had gone to Banting to meet him. The first accused led no evidence that Sosilawati and company could not have possibly came down to Banting to see him. In fact, the first accused made no attempts to deny that he had issued the cheques to Sosilawati. In the light of bare denial, the testimoni of the Sosilawati's daughter stood that Sosilawati had gone to Banting to meet the first accused (see para 246).

(5) The defence called no evidence of the expert of their own to counter the evidence of the experts called by the prosecution in the form of the medical and chemist evidence. Without any expert evidence to the

contrary, there was no reason to disregard of the medical evidence of the finding of human bones on the farm or the matching blood sample found on the zinc, cricket bat and the walls on the farm (see para 270).

(6) In his evidence, the first accused unwittingly spilled out a more cogent reason to commit murder. The first accused testified that for the same piece of land in Penang he was acting for both Sosilawati and Rahman Palil on two separate deals, both of which he had an interest in. He would stand to benefit more in the deal with Rahman Palil as the value of the land had sky-rocketed (see para 279).

(7) The prosecution had proven beyond all reasonable doubt all the charges against the four accused. All four accused were found guilty of all the four charges and sentenced to death by hanging for each of the four charges (see para 299).

[Bahasa Malaysia summary

Empat tertuduh telah dituduh dengan empat pertuduhan di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama s 34 Kanun atas kesalahan mempunyai niat bersama untuk membunuh empat orang, iaitu, Sosilawati bt Lawiya, Ahmad Kamil bin Abdul Karim, Noorhisham bin Mohamad dan Kamaruddin bin Shamsuddin ('Sosilawati dan rakan lain'). Pada malam tragedi itu, terdapat beberapa perbualan antara Sosilawati dan rakan lain dengan keluarga dan kawan-kawan mereka, semuanya membawa kepada fakta bahawa mereka menuju ke arah Banting. Siasatan oleh pihak polis membawa kepada destinasi terakhir Sosilawati dan rakan lain iaitu ladang milik tertuduh pertama. Berdasarkan testimoni beberapa saksi, polis mendapati kayu yang dibakar yang telah dicampakkan di satu longgokan sampah tidak jauh daipada ladang itu, kepingan zink terbakar dan kayu pemukul kriket yang mengandungi kesan darah. DNA pada kayu pemukul kriket dan bahan uji yang diambil daripada dinding dalam ladang itu didapati sepadan dengan ahli keluarga terdekat Sosilawati dan rakan lain. Pendakwaan didapati telah membuktikan kes prima facie melalui kombinasi keterangan sekeliling dalam bentuk testimoni ahi keluarga, rekod telekomunikasi, testimoni saksi-saksi yang boleh dipercayai yang dibantu dengan inferens yang dibuat daripada perlakuan tertuduh dalam penemuan ekshibit-ekshibit dan juga keterangan forensik dan perubatan. Berikutan itu, keempat-empat tertuduh itu telah dipanggil untuk memasukkan pembelaan. Tertuduh pertama mengakui bahawa ladang itu miliknya tetapi dia tidak berada di ladang itu pada malam tersebut untuk berjumpa Sosilawati dan rakan lain. Tertuduh pertama menyatakan bahawa pada malam itu, dia telah pergi ke rumah ibunya dan juga dia telah pergi bersama ejen estet untuk melihat beberapa tapak tanah. Tertuduh pertama mengesahkan bahawa dia merupakan peguam Sosilawati dalam transaksi tanah di Pulau Pinang dan bahawa dia juga mempunyai kepentingan dalam belian tanah itu kerana telah mengeluarkan wang. Dia juga peguam untuk sebuah syarikat lain milik Rahman Palil untuk tanah yang sama

dan juga mempunyai kepentingan dalam transaksi tanah ini. Tertuduh kedua dan ketiga memberi keterangan bahawa mereka berada di ladang itu pada malam tersebut dan kedua-duanya mengesahkan bahawa tertuduh pertama merupakan pemilik ladang itu meskipun urusan mereka kebanyakannya adalah dengan tertuduh keempat yang membayar gaji mereka dan mengawal dan mengarah kerja mereka di ladang itu. Kedua-dua tertuduh memberi keterangan bahawa tertuduh pertama tidak datang ke ladang itu pada malam tersebut. Tertuduh pertama dan kedua selanjutnya memberi keterangan bahawa mereka bersama tertuduh keempat dan dua yang lain, telah berkumpul di ladang itu sekitar waktu tengah malam untuk menyambut Hari Merdeka. Selepas sambutan itu, mereka makan dan tidur sehingga keesokan pagi. Tertuduh keempat memberi keterangan bahawa dia tinggal di ladang itu yang dimiliki tertuduh pertama dan peranannya di ladang itu bagaimanapun terbatas kepada kerja pembinaan di ladang itu. Menurut tertuduh keempat, Sosilawati dan rakan lain sememangnya telah datang ke ladang itu untuk berjumpa dengan tertuduh pertama dan pada malam tersebut, dia mendengar pertengkaran di salah satu daripada premis itu dan apabila dia pergi untuk melihat apa yang berlaku, dia melihat pemandu Sosilawati dan peguamnya dipukul. Tertuduh keempat juga mendengar tertuduh pertama memberi arahan kepada tertuduh kedua dan ketiga untuk membunuh pemandu dan peguam itu. Akhirnya dia melihat Sosilawati dan rakan lain bersama beberapa orang lain dibungkus dan dibawa ke ladang berhampiran. Keesokan pagi dia melihat mereka yang dibungkus untuk ke ladang berhampiran dibawa balik ke ladang itu oleh tertuduh kedua dan ketiga. Di ladang itu, dia menjadi saksi tiga orang yang menemani Sosilawati dibakar atas kayu yang disusun. Tertuduh keempat juga memberi keterangan bahawa tertuduh pertama telah membuat percubaan untuk memujuknya untuk menerima apa yang telah berlaku dan memintanya dan tertuduh kedua dan ketiga berdiam diri tentang perkara itu. Tertuduh pertama juga telah menyediakan mereka untuk berdepan dengan kemungkinan tangkapan oleh pihak polis dan menyatakan bahawa mereka boleh bekerjasama dengan pihak polis kerana mereka kemudian boleh menarik balik daripada apa-apa kenyataan kepada polis dengan mendakwa bahawa mereka telah membuat kenyataan itu dibawah paksaan.

Diputuskan, menolak rayuan:

(1) Amat jelas bahawa pembelaan tertuduh tidak dirungkai terutama antara ketiga-tiga tertuduh dan keempat tertuduh. Dalam menghadapi kepelbagaian sedemikian antara keterangan tertuduh, mahkamah boleh memilih untuk tidak mempercayai keterangan kesemua tertuduh dan menerima versi pendakwaan. Pembelaan ini bertujuan untuk menerangkan kepelbagaian ini sebagai keterangan kepada hakikat terdapat perselisihan faham antara tertuduh pertama dan tertuduh keempat apabila tertuduh pertama telah menolak permintaan bantuan daripada tertuduh keempat. Ini mungkin benar, tetapi ia masih tidak

menjelaskan kepelbagaian dalam keterangan dengan mengambil kira beberapa bahagian bukti tertuduh keempat adalah konsisten dengan keterangan pendakwaan. Mahkamah memilih untuk tidak mempercayai keterangan tiga tertuduh pertama bahawa tiada apa-apa yang telah berlaku di ladang pada malam itu berkaitan dengan Sosilawati dan rakan lain. Mahkamah selanjutnya membuat dapatan fakta afirmatif bahawa Sosilawati dan rakan lain berada di ladang itu dan bahawa kesemua empat tertuduh telah bertemu Sosilawati dan rakan lain di ladang itu pada malam tersebut (lihat perenggan 223, 228–229).

(2) Terhadap tertuduh keempat, mahkamah memilih untuk mempercayai bahagian keterangannya yang konsisten dengan keterangan pendakwaan. Ini termasuklah keterangan pendakwaan berhubung kedatangan Sosilawati dan rakan lain ke ladang itu, unggun api yang dimulakan di ladang itu untuk membakar sekurang-kurangnya tiga ahli daripada Sosilawati dan rakan lain dan ahli-ahli Sosilawati dan rakan lain telah dipukul di ladang itu pada malam tersebut. Keterangan tertuduh keempat patut diberikan penilaian berasingan kerana ia memberikan versi yang berbeza daripada versi pembelaan atau pendakwaan. Keterangan tertuduh keempat direka untuk menggambarkan kejujurannya dan tidak mengaitkannya dengan aktiviiti jenayah yang dikatakannya berlaku di ladang itu. Tertuduh keempat telah memanipulasikan keterangan untuk disesuaikan dengan kesnya sendiri. Tertuduh keempat hadir semasa sebahagian besar daripada prosiding tersebut berjalan dan telah mendengar keterangan pelbagai saksi. Tidak sukar untuknya menyesuaikan keterangannya sendiri agar menyebelahinya. Selanjutnya, sebagai tertuduh bersama, ia memberi kelebihan kepadanya untuk mempersalahkan orang lain agar dapat menyelamatkan dirinya sendiri (lihat perenggan 228–232).

(3) Keseluruhan keterangan bahawa kumpulan ini telah dibungkus dan dibawa oleh tertuduh pertama kedua dan ketiga ke ladang berhampiran dengan sendirinya tidak boleh dipercayai kerana pasti kumpulan sebesar itu tidak boleh disimpan semalaman tanpa menarik apa-apa perhatian. Selanjutnya siasatan polis tidak menunjukkan apa-apa penglibatan jiran bersebelahan. Keterangan kumpulan orang ini berhubung ladang bersebelahan adalah rekaan tertuduh keempat dan jalan keluar untuk menghapuskan bukti pembabitan dirinya dengan kejadian yang berlaku di ladang tersebut (lihat perenggan 233, 235–236).

(4) Tertuduh pertama tidak memberi penjelasan bahawa ahli keluarga telah silap atau menipu apabila memberi keterangan bahawa Sosilawati dan rakan lain telah pergi ke Banting untuk berjumpa dengannya. Tertuduh pertama tidak memberi keterangan bahawa Sosilawati dan rakan lain tidak mungkin telah datang ke Banting untuk berjumpa dengannya. Bahkan, tertuduh pertama tidak membuat percubaan untuk menafikan

bahawa dia telah mengeluarkan cek kepada Sosilawati. Berdasarkan testimoni anak perempuan Sosilawati menunjukkan bahawa Sosilawati telah pergi ke Banting untuk berjumpa dengan tertuduh pertama oleh itu keterangan tertuduh pertama merupakan penafian kosong semata (lihat perenggan 246).

(5) Pembelaan tidak memanggil apa-apa keterangan pakar mereka sendiri untuk menentang keterangan pakar yang dipanggil oleh pendakwaan dalam bentuk keterangan perubatan dan kimia. Tanpa apa-apa keterangan pakar yang berlawanan, tiada sebab untuk mengetepikan keterangan perubatan akan penemuan tulang manusia di ladang itu atau sampel darah yang sepadan ditemui di atas zink, kayu pemukul kriket dan dinding di ladang itu (lihat perenggan 270).

(6) Dalam keterangannya, tertuduh pertama secara tidak sengaja telah membocorkan sebab utama pembunuhan itu dilakukan. Tertuduh pertama memberi keterangan bahawa untuk tanah yang sama di Pulau Pinang dia bertindak untuk kedua-dua Sosilawati dan Rahman Palil untuk dua urusan berasingan, kedua-duanya yang mana dia mempunyai kepentingan. Dia akan mendapat faedah lebih dalam urusan dengan Rahman Palil kerana nilai tanah itu telah naik mendadak (lihat perenggan 279).

(7) Pendakwaan telah membuktikan melampaui keraguan munasabah bagisetiap pertuduhan terhadap keempat-empat tertuduh. Kesemua tertuduh didapati bersalah atas semua pertuduhan dan dijatuhkan hukuman mati digantung untuk setiap empat pertuduhan itu (lihat perenggan 299).]

Notes

For cases on appeal, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1457–1459.

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Belhaven and Stenton Peerage (1875) 1 App Cas 278, HL (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)
Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1, CA (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507; [1999] 1 CLJ 892, FC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)
Ismail v Hasnul Abdul Ghafar v Hasnul [1968] 1 MLJ 108, FC (refd)
Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)
Liew Kaling & Ors v PP [1960] 1 MLJ 306b, CA (refd)

PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Datuk Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Lim Teik Seng [1985] 2 CLJ 61, HC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Samsudin v PP [1962] 1 MLJ 405, CA (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (distd)

Legislation referred to

Criminal Procedure Code ss 112, 112(5), 133, 170(1), 174(a), 179(1), 180, 180(1), (4), 182A
Evidence Act 1950 ss 3, 8, Illustration (e), 11, 27, 32, 35, 73, 74, 76, 77, 90A(1), (2), (3)(b), (5), (6), s 90B(a), 133, 154
Penal Code ss 34, 300, 300(a), 302, 302(a)

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Akhtar Tahir J:

[1] The four accused in this case were each charged for four charges as follows:

Pertuduhan

Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No. 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Kamaruddin bin Shamsuddin (No. K/P: 660809–06–5241) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

Pertuduhan

Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No. 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Noorhisham bin Mohamad (No. K/P: 720913–01–5043) dan dengan itu kamu telah

melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

Pertuduhan

Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No. 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Sosilawati binti Lawiya (No. K/P: 630712–01–5240) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

Pertuduhan

Bahawa kamu pada 30 Ogos 2010 di antara 8.30 malam dan 9.45 malam, bertempat di Lot No. 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting di dalam Daerah Kuala Langat, di dalam negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Ahmad Kamil bin Abdul Karim (No. K/P: 781023–05–5253) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan yang dibaca bersama dengan seksyen 34 Kanun yang sama.

THE PARTIES

[2] The four accused were for the purposes of this trial referred to as follows: Pathmanabhan a/l Nalliannen as the first accused, Thilaiyalagan a/l Thanasegaran as the second accused, Matan a/l Ravichandran as the third accused and Kathavarayan a/l Rajadorai as the fourth accused.

[3] The persons whom the four accused were alleged to have killed as mentioned in the charges were Sosilawati bt Lawiya, Ahmad Kamil bin Abdul Karim a lawyer by profession, Noorhisham bin Mohamad a banker and Kamaruddin bin Shamsuddin Sosilawati's driver. All will be collectively referred to as Sosilawati and company for the purposes of this grounds of judgment.

[4] The trial against the four accused proceeded jointly as is allowed under s 170(1) of the Criminal Procedure Code which, inter alia, reads as follows:

> When more persons than one are accused of the same offence or of different offences committed in the same transaction, they may be tried and charged together or separately as the Court thinks fit …

NARRATIVE OF FACTS AND EVIDENCE AS PER THE PROSECUTION CASE

Journey undertaken by Sosilawati and company on 30 August 2010

[5] The narrative of events in this case should rightly start with the journey undertaken by Sosilawati and company from their place of origin to their final destination on the 30 August 2010.

[6] Sosilawati and her driver started from Sosilawati's office at Nouvelles Visages, No 59, Lorong Haji Hussein 1, off Jalan Raja Bot, Kuala Lumpur. Sosilawati intimated to her daughter Erni Dekritawati Yuliana bt Buhari ('SP15') that she was going to Banting to meet lawyer Pathma ('the first accused'). The purpose of the visit as told by Sosilawati to SP15 was to bring forward the payments on two cheques of the amount RM3m and RM1m respectively issued by the first accused. The reason being Sosilawati needed money to pay bonuses to her staff and also give money to her family for the upcoming *Hari Raya* festival.

[7] Sosilawati left with her driver in her BMW car bearing the registration number WTL 11. Evidence was further led through the wife of Noorhisham, Suzana Radin Pangit ('SP8') that her husband and Ahmad Kamil had also accompanied Sosilawati on her journey to Banting albeit in a different car also a BMW car bearing registration number AAJ 5. Similar evidence was given by Ahmad Kamil's wife Sabrina bt Adnan ('SP14').

[8] There were various conversations between Sosilawati and company with their family and friends throughout the journey all alluding to the fact that they were going towards Banting. The last calls received were by SP15 who received an unusual call at 8.30pm from Sosilawati which indicated that she had suspicions that photographs of her in compromising positions may have been secretly recorded by her driver by hidden cameras placed in the toilet. A similar call had gone to her friend by the name Habishah bt Bahari ('SP16'). Both SP15 and SP16 had checked the toilet in the bedroom of Sosilawati in her house but found nothing incriminating.

[9] Similar unusual calls were received by SP8 and SP14 at 8.15pm and 7.54 respectively from their respective husbands that they would not return home for the next three days the reasons was tied to the problems faced by Sosilawati with her driver.

[10] After these last calls all attempts to contact Sosilawati and company failed to elicit any response from them leading to anxiety on the part of the

Sosilawati and company's family members. A result of which Sosilawati's daughter and her ex husband Buhari bin Mohamed ('SP24') went down to Banting to locate her but failed. SP24 even called the first accused who denied having met Sosilawati on 30 August 2010.

First information reports

[11] When all attempts to locate Sosilawati failed police reports were lodged at the first instance by Sosilawati's daughter Erni Erinawati Sofia ('SP1') on 31 August 2010 followed by police reports from the family members of the other three missing persons.

The farm

[12] On initial investigations police zeroed in on a farm at Lot 2001, Jalan Tanjong Layang, Tanjong Sepat, Banting, Selangor ('the farm') suspected to be the final location of Sosilawati and company. The prosecution led evidence through Shree Ganashan a/l Krisnen ('SP58') that the farm had been sold to the first accused and on 30 August 2010 the first accused was the owner of the farm.

Telecommunication records

[13] Telecommunication records kept by the various service providers namely DIGI, Maxis and Celcom charted the journey of Sosilawati and company until the final destination at the farm. These records included the records of the registered users of the mobile number as well as call detail records ('CDR') and itemised bills. The CDR's and itemised bills captures the details of incoming,outgoing calls and short messaging system ('SMS') as well as the time this calls and SMS were made.

[14] The other information contained also identifies the transmission towers servicing this calls. From the combination of this information it could be ascertained the transmission tower which serviced the call which is usually the tower nearest to the location. This would indicate the location of the persons communicating. The durations of the calls would also be recorded.

[15] Amongst the witnesses called from the telecommunication companies were from Celcom: Norazlina bt Ahmed ('SP40'), Abdul latif bin Mohamed ('SP41'), Haisal bin Hambali ('SP44') and Mohd Razali bin Ismail ('SP102'), from Maxis Ahmad Safuan bin Shahrani ('SP46') and Prasath a/l Ramasamy ('SP47') and from DIGI was Chong Chee Wah ('SP64').

Zurayina bt Jemaat ('SP7')

[16] A sales girl at Fazz Enterprise Banting who confirmed seeing Sosilawati and a person called Kamal at her shop where Sosilawati had bought *kerepek* and *raya* cakes worth RM200 at around 5.20pm. Sosilawati had come in a black BMW car.

Occupants of the farm

[17] The prosecution called two persons who were on the farm on the evening and night of 30 August 2010. The first witness Siti Hamidah bt Karnax ('SP33') who testified that she saw one lady and three men entering the farm on the evening of 30 August 2010. She had also been warned by the fourth accused of coming out of the house at any time during this period. She also testified of hearing a woman scream and also saw a huge fire on the night of 30 August 2010. She had a day earlier saw amongst others the third accused and some others unloading logs at the farm from a lorry.

[18] The other occupant of the farm Vakasan a/l Richard ('SP89') however testified he had slept early the night on 30 August 2010 after watching television and therefore did not see anything the night as he only woke up early next morning.

Information leading to discovery

[19] The prosecution then led evidence to show the arrest of the second to fourth accused and two other Suresh a/l Ulaganathan ('SP29') and Saravanan a/l Kandasamy ('SP59') on the 9 September 2010. This arrests were led by Supt Denis Leong Soon Kuai ('SP27') who also carried out initial investigations on the farm.

[20] This arrested persons were interviewed by Chief Inspector Govindan a/l Narayansamy ('SP32') on 12 September 2010 and as a result of questioning the second and fourth accused together with SP29 (to be referred for sake of convenience as 'informants') took SP32 and his team to the various spots in and out of the farm where numerous items were recovered.

[21] The defence counsel objected to the evidence of the information as they contended that it was given under oppression. I then conducted a trial within a trial ('TWT') to determine whether there was any sort of oppression for me to reject the information given.

[22] At this TWT nine witnesses testified on behalf of the second and fourth

accused including the second and fourth accused whereas the prosecution called ten rebuttal witnesses. At the end of the TWT I decided that there was no evidence of oppression and I allowed the admissibility of the information given by the informants.

[23] As a result of the information given by the informants SP32 and a team of police officers were led to a black spot on the farm. On digging this black spot a number of bones were unearthed. The bones were cleaned and collected and given to medical personnel for forensic examination.

[24] On the farm the police also seized a cricket bat which had traces of blood and took cotton swabs from the walls which showed traces of blood.

[25] On further information by the informants the police with the help of police divers recovered a number of items which included watches and hand phones which were identified later by family members as belonging to members of Sosilawati and company.

[26] On the information of the informants the police also discovered the two vehicles in which Sosilawati had used to go to Banting. The vehicles were found in two different locations in Subang Jaya.

[27] Finally on the information of the informants the police discovered burnt logs which were thrown at a rubbish dump not far away from the farm. The police also discovered burnt zinc sheets of which some contained traces of blood. All these items were seized and handed to the various agencies for further forensic examination.

Medical evidence

[28] A number of medical practitioners had testified at this trial and the three doctors who had examined the bones recovered from the rivers and the farm were Nurliza bt Abdullah ('SP63'), Zaleha bt Abdul Manaf ('SP71') and Faridah bt Mohd Nor ('SP80'). SP71 and SP80 could not make positive findings of the bones as there was too charred and burnt indicating exposure to extreme heat. For the same reason no DNA extraction or analysis could be done by the chemist Lim Kong Boon ('SP86'). SP63 however positively identified that some of the bones recovered from the farm and river were human bones.

[29] A number of medical personnel were also involved in taking the blood samples from family members of Sosilawati and company for purposes of comparative DNA analysis and a number of police personnel were involved in

sending the samples to the chemist.

Chemist evidence

[30] SP86 the director of Forensic Division of the Chemistry Department Petaling Jaya managed to extract DNA from the blood samples taken from the zinc sheets, the cricket bat and swabs from the wall in the farm and on analysis found that this DNA matched the that of the immediate family members of Sosilawati and company.

Police investigators

[31] A number of police investigation teams were involved in the investigation and this included crime scene investigators as well as forensic investigators. The police investigation team also included divers and photographers. All this police personnel were involved in recovering the exhibits packing them and sending them for analysis.

Evidence of SP29 and SP59 and P711 and P712

[32] Both SP29 and SP59 were arrested together with the second to fourth accused. SP29 and SP59 were charged in the court for disposing of evidence of a crime of murder. SP29 was charged with disposing the ashes of Sosilawati and company whereas SP59 was charged with helping to burn the bodies of Sosilawati and company. Both SP29 and SP59 pleaded guilty to the charges against them and admitted to the facts in support of the charge. Both were sentenced to imprisonment and their sentenced were upheld and enhanced by the High Court.

[33] Before me both SP29 and SP59 alleged they were coerced into pleading guilty and nothing of what they had admitted had happened at the farm. They further contented that nothing untoward happened at the farm and both were at the farm on the night of 30 August 2010 to celebrate *Merdeka*.

[34] The prosecution sought to impeach the credit of both this witnesses based on their police statement recorded under s 112 of the Criminal Procedure Code. As both SP29 and SP59 denied the contents of the police statement a TWT was conducted to determine the admissibility of the police statement.

[35] After conducting two separate TWT for each of the witness I allowed the police statement of SP29 to be admitted and be used against him in an impeachment proceeding. The police statement of SP59 I ruled as inadmissible but allowed the application of the prosecution to treat SP59 as a hostile witness. I postponed the ruling on the credibility of these two witnesses to the end of the prosecution's case.

[36] The prosecution towards the end of their case applied to adduce the record of the proceedings against both SP29 and SP59 both in the magistrate's court as well as the High Court. I allowed this application of the prosecution partly by allowing the proceedings before the magistrate to be adduced under ss 11 and 35 of the Evidence Act 1950. The records were marked as P711 and P712 respectively.

EVALUATION OF PROSECUTION EVIDENCE AND FINDING OF FACTS

[37] Before evaluating the evidence it is erstwhile to state that decisions and findings made in a criminal proceeding should always be in consonance with the criminal law and procedure. No public opinion or media reports and theories can or should infiltrate in arriving at a decision.

[38] It is important to highlight this matter to answer the concern of the defence that the court might be influenced and swayed by the wide publicity in the print and electronic media given to this case in arriving at a decision.

Evidence of family members

[39] The evidence of the family members was literally unchallenged. I found the evidence of the family members to be credible and to me none of the family members had a reason to lie.

[40] It is my firm finding of fact based on the unblemished evidence of family members that Sosilawati did intend to go to Banting on 30 August 2010 to meet the first accused in relation to the two cheques issued by the first accused. The evidence of the sales girl SP7 and the various conversations with family members prove that Sosilawati and company did embark on the journey to Banting and did in fact reach Banting.

[41] There was nothing untoward of Sosilawati's intention to meet the first accused with regards to the cheque. There was ample evidence of the legal relationship between Sosilawati and the first accused as the first accused had

acted for Sosilawati on land transactions in Penang. There is also no challenge that the two cheques which Sosilawati intended to bring forward were issued by the first accused.

[42] Sosilawati's decision to bring along her driver, her lawyer and the banker also did not raise any eyebrow because they were acquaintances of Sosilawati. They could have also followed Sosilawati to break fast as it was the fasting month and this was in fact conveyed to the family members.

[43] In the face of this specific intention of Sosilawati to meet the first accused in relation to the cheque it can be deemed that the unusual calls with regards to the driver and not returning for three days could be just a ploy to throw the family off guard and stop them from immediately searching for Sosilawati and company.

[44] It is clear Sosilawati's daughters did not buy this story as they had immediately the next day attempted to search for Sosilawati. It is also significant that the first information report was lodged by Sosilawati's family at the first available opportunity indicating that it was not in the character of Sosilawati to just go missing.

[45] The intentions as conveyed to the family members also answers the contention of the defence counsel that Sosilawati could have gone to Banting to meet someone else and suggesting the names of Rahman Palil and others who were also linked to the land deal. To me these suggestions are not tenable in the light of clear intention to meet the first accused.

Telecommunication records

[46] The main objections of the defence against the telecommunication records were its admissibility and accuracy. It is obvious that the data generated in the telecommunication records were computer generated and therefore the records could be termed as computer generated documents.

[47] I could not accept the defence contention that the data captured in the documents were of hybrid nature by marrying information from various computers and departments which required human intervention and therefore could not be regarded as computer generated documents. This contention clearly goes against the definition of computer in s 3 of the Evidence Act 1950 which gives a very wide definition of computer. The court should refrain from giving a narrow interpretation where the statute itself reflects liberalism.

[48] Section 3 of the Evidence Act 1950 before amendment stated as follows:

A

> 'computer' means any device for recording, storing, processing, retrieving ot producing any information or other matter, or for performing any or more of the functions, by whatever name or description such device is called; and where two or more computers carry out any or more of the functions in combination or in succession or however otherwise conjointly they shall be treated as a single computer

B

[49] In 2012 the definition of 'computer' was amended to take account the rapid technological advancement. The new definition of 'computer' reads as follows:

C

> 'computer' means an electronic, magnetic, optical,electrochemical, or other data processing divise, or a group of such interconnected or related devises, performing logical, arithmetic, stoerage and display functions, and includes any data storage facility or communication facility directly related to or operating in conjunction with such devise or group of such interconnected or related devises, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar devise which is not programmable or which does not contain any data storage facility.

D

E

[50] It is clear that the provisions of computer generated document were enacted as broad and wide exceptions to the general rule that only original documents through the maker should and can be admitted. In cases of computer generated document neither the maker nor the original can be readily identified.

F

[51] In the case of *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1 at p 14 Mahadeve Shankar JCA stated as follows:

G

> we need to remind ourselves that s 90A was enacted to bring the 'best evidence rule' up to date with the realities of the electronic age … The effect of s 90A(1) in the present scenario is that it is no longer necessary to call the actual teller or bank clerk who keyed in the data to come to court provided he did so in the course of the ordinary use of the computer.

H

[52] Looking at the documents themselves without going any further it is sufficient to consider them as computer generated documents the admissibility of which is governed by s 90A(1) of the Evidence Act 1950 which states that:

I

> In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement

[53] It can be seen from this provision that the only pre condition to admissibility is that the document must be produced by the computer in the course of its ordinary use.

[54] The fact that the computer was used in the course of its ordinary use can be certified by the person having management and control over the computer as stated in s 90A(2) of the Evidence Act 1950 and the effect of the certificate is as stated in s 90A(3)(b) of the Evidence Act 1950.

[55] Case law has determined that a certificate is not necessary if the person in charge of the management and control over the computer himself comes to the court to testify. His oral testimony on the role of the computer is sufficient.

[56] Further relaxation to the rule requiring a certificate is s 90A(6) which provides, inter alia, that documents produced in the course of investigation by a computer can be deemed to be produced by a computer in the course of its ordinary use.

[57] In this case I was satisfied that the witnesses who were called had full management and control of the computers generating the documents and had confirmed as to the accuracy of the date produced in the documents and records. In fact the calling of these witnesses had added value to the contents of the documents and records by explaining the various inputs in the documents and record.

[58] The defence counsel's concern that there was human intervention during the production of the computer generated document is answered in s 90A(5) which states that:

> A document shall have been deemed to have been produced by a computer whether it was produced by it directly or by any means of any appropriate equipment, and whether or not there was any direct or indirect human intervention

[59] The weight to be attached to a computer generated document is stated in s 90B(a):

> In estimating the weight if any, to be attached to a document, or statement contained in a document, admitted by virtue of section 90A, the court -
>
> > may draw any reasonable inference from the circumstances relating to the document or the statement, including the manner and purpose of its creation, or its accuracy or otherwise

[60] On the matter of accuracy I am of the view that human are more

infallible in making mistakes rather than a machine. In a lighter vein it can be stated that for ages a lie detecting machine is used in detecting human lies.

[61] I have perused the telecommunication documents and cannot find significant discrepancies with the oral evidence of the witnesses with regards to the time of the call and the duration. Where such discrepancies do occur it is my ruling that the documents should be regarded as the accurate and reliable version.

[62] In accepting this telecommunication documents it is my finding that the documents accurately chart out the journey of Sosilawati and company on the 30 August 2010 right until the last calls which activated the Batu Laut transmission tower not far from the farm.

[63] The significance of the telecommunication data is also not lost on the fact, that the last calls made by Sosilawati and company were in the area where the farm is situated and since the farm belongs to the first accused it ties it to the purpose Sosilawati made the trip to Banting to meet the first accused.

Evidence of the occupants of the farm SP33 and SP89

[64] The defence was especially vocal in attacking the credibility of SP33 highlighting that she had special escorts to the court and was treated as a special witness. To me the privilege given to SP33 was not because she was a favourable witness to the prosecution but more because of safety issues. This safety concerns towards SP33 had prompted the authorities to place her in the witness protection programme.

[65] The clearest indication that this witness was a credible and truthful witness was when she honestly answered that she said she saw three men and one woman entering the farm on the evening of 30 August 2010 but could not recognise them and was not able to confirm when the photographs of Sosilawati and company were shown to her that these were the persons who had come to the farm.

[66] If she had been coached by the prosecution or had leaned in bias towards the prosecution she could have positively identified Sosilawati and company which would have cut out the work for the prosecution.

[67] SP33's other evidence which is equally cogent is that on the night of 30 August 2010 she had heard a women scream and she also saw big fire the

height of which reached the level of the adjoining palm oil trees. The photographs taken by the police clearly show the effect of burning on the leaves of the adjoining palm oil trees.

[68] SP33 also testified that she had seen logs being off loaded from a lorry a day earlier by the third accused and other workers and she had also observed the first and fourth accused making preparations indicating arrival of guests.

[69] The importance of the observation made by SP33 is not lost on the fact that the arrival of the guest was a planned visit and not an incidental one and more importantly shows a prearranged plan between at least the first and the fourth accused. This observation also ties to the fact that Sosilawati had made arrangements to meet the first accused and would have surely contacted the first accused to convey her intention to meet him. SP33 seeing three men and one woman conforms to the description of Sosilawati and company.

[70] The other occupant of the farm who was called by the prosecution SP89 was a witness of no consequence as he took the attitude of the proverbial monkey of seeing no evil, hearing no evil, and speaking no evil. To me his testimony indicated that even if any incident had taken place on the farm on the 30 of August he would not have known as he had slept right until the morning. From my observation this witness was not a wholly truthful witness who sought not to cooperate or volunteer any information and taking the cautious attitude of being neutral.

Information leading to discovery and evidence of SP32

[71] A substantial portion of the prosecution case is rested on the evidence of SP32 Inspector Govindan who had given a breakthrough in the police investigation by eliciting information from the second and fourth accused and SP29 leading to discovery of items pertinent to explain what had happened on 30 August 2010.

[72] Before embarking on the evidence of SP32 it would be well to start off with the law surrounding the issue of information leading to discovery which is encapsuled in s 27 of the Evidence Act.

[73] Section 27 reads as follows:

> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved

[74] There a plethora of cases defining and interpreting the above provision and I do not propose to delve in all those cases. Suffice for the purposes of this case to address the objections raised by the defence counsel on the admissibility of the information which to me was two prong.

[75] The first objection was in the manner the information was extracted and the defence coined the word 'oppression' in describing the manner the information was extracted. The second objection was that the actual words of the information were not recorded accurately.

[76] It has been widely accepted by the courts that the provision in s 27 is an exception to the rule of voluntariness required in the admissibility of a confession and even the defence in this court acknowledged this fact.

[77] In the Federal Court case of *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389 at p 404; [2005] 2 CLJ 481, at p 498 Augustine Paul JCA (as His Lordship then was) stated as follows:

> It has been established by a long line of authorities that s 27 is independent and not subject to the voluntariness rule in s 24 … In our opinion it is illogical to suggest that s 27 is subject to the voluntariness rule in s 24. If that were to be so desired evidence can be admitted under s 24 without there being a need of s 27. The fact that s 27 has been specifically enacted is therefore a clear indication that it has a purpose of its own to serve

[78] The court in this case further decided that the information under s 27 can be excluded but based 'on the facts of the case'. For this proposition reliance was placed in the case of *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 892 where it was stated that:

> … The facts and circumstances of the case show that the s 27 information had an adverse effect on the fairness of the proceedings that the learned trial judge ought not have admitted it

[79] In *Francis Antonysamy*'s case the court however observed as follows:

> Therefore the circumstances of involuntariness must indeed be extraordinary in order to exclude a statement on the ground which, in the first place, does not affect its admissibility in law

[80] Further on in *Francis Antonysamy*'s case it is stated as follows:

> The party that is seeking to have the evidence excluded in the exercise of the discretion of the court has the onus of showing on the balance of probabilities, that the discretion should be exercised in its favour … The appropriate way of dealing with an application of this nature is by way of trial within a trial …

[81] Two principles that can be elicited from the above passage is that the burden lies on party wishing to exclude the evidence and in this case it is the defence and the appropriate way of dealing with this objection is to hold a trial within a trial. This is what I did in this case.

[82] A TWT was held in this case whereby the defence was directed to call its witnesses first as the burden was upon them to lead evidence to show why the information given by the second and fourth accused should be excluded. The defence called nine witnesses including all the four accused whereas the prosecution called ten rebuttal witnesses.

[83] The main allegations leveled against the prosecution were that the second and fourth accused were physically assaulted as well as threatened by pointing pistol at them by SP32 and his team of officers who had questioned the accused on 11 September 2010.

[84] To support their case of physical assault the defence produced police reports lodged by the accused as well as called medical evidence to show that they had suffered injuries as a result of the physical assault. However I noted that the police reports were only lodged one month later and the medical examination was also after one month. Even if there were injuries detected it could not be pinpointed to the period one month earlier. Anything and any one could have access to the accused within this one month.

[85] Further if the accused were truly beaten as they alleged they would have suffered severe injuries requiring immediate medical treatment and there is no evidence of such treatment being given. In fact following the information given the second and fourth accused were at the farm and other public places pointing to the various locations where items were recovered. They were photographed while assisting the police in the various discoveries and none of the photographs showed any physical injuries on the accused and not to forget there were members of the media who were also present at the various locations taking photographs.

[86] The police officers especially SP32 whom the accused claimed beat them testified in rebuttal and denied any such physical assault. As no incident of such beating took place the most that the police officers could do was to deny the assault having taken place which to me was an effective rebuttal of the allegations.

[87] I also ruled that SP32 the witness in the center of the allegation of the physical assault as well as allegation of pulling out a pistol to threaten the accused was a truthful witness who was unfazed in the face of relentless cross-examination by all the defence counsel. I also accepted the testimony of SP32 that, as the questioning was done in a room at the police station the police officers were forbidden from carrying in firearms.

[88] I was also satisfied that SP32 became directly involved with the second to fourth accused on the 11 September 2010 when he first questioned them. He might have attended earlier briefings on the investigation of this case but to me this was not unusual taking into the account the fact that this case had attracted the participation of large number of police investigation teams. I could not accept the defence contention that SP32 was an untruthful witness merely because he had denied earlier involvement in this case.

[89] In this case I also noted that although the general information of discovery was given on the 12 September 2010 there were specific information given at each stage of the discovery. These discoveries were made in the sight of the public including the media.

[90] In fact the defence produced a newspaper photograph showing one of the accused being held in a strangle hold at one of the site of discovery. It was the contention that the manner the accused was held suggested that they had been manhandled. The police man holding the accused in such a manner explained that he did so for the safety of the accused himself to prevent the accused from falling down to from the place they were standing down into the river. It was also to prevent the accused from escaping. I accepted both this explanation to be probable reasons for such actions especially it being in the sight of the media the police would not risk adverse publicity.

[91] The other contentions by the defence that the accused at times were not given food, were mere allegations and not supported by evidence. The prosecution had also effectively rebutted this allegation by calling witnesses who testified that they had served food to the accused at the designated times.

[92] One other contention by the defence was that the accused were subjected to long hours outside the lock up causing them fatigue and loss of rest. It was borne out by evidence that the accused were removed from the lock up in the morning and only returned back in early hours of the morning. This was to facilitate the findings of the various exhibits which took a considerable time to be unearth and recover.

[93] To me the accused were kept out of the lock up out of necessity rather than in any way to antagonise them. Further the unearthing of the items was

done by the police and the medical team and not the accused. If any one were to complain of fatigue it should be these personnel. The contention also that the accused were denied facilities for personal hygiene is to be seen in the context that the accused were under detention and could not expect five star facilities of warm shower.

[94] The question confronting me at the end of the TWT was whether the second and fourth accused had suffered oppression to such an extent forcing them to give the information which they might not have otherwise given. It was my finding that the accused suffered no such oppression that could have sapped their will and force them to reveal matters beyond their comprehension.

[95] The police had acted within their means and powers to extract the information given by the accused. Further I accepted the testimony of SP32 as to the content of the information given although the exact words were not before the court. It was the testimony of SP32 he in fact had recorded this information given by the second and fourth accused in a book. I disallowed the admission of this book in evidence as SP32 admitted that it was not an official book kept by him and could not throw any light as to the status of the book or its contents. I also accepted the defence contention that the book might contain information prejudicial to the accused.

[96] In accepting the contents of the information I accepted the oral evidence of SP32 as to its accuracy and the words used. I also accepted the oral evidence of SP32 on the contents as fair as he had not purposely incorporated any confessions in the information although this is allowed under the law.

[97] As the information stood it showed mere knowledge of the places where the items could be found. There was nothing in the information that alluded to the confession of murder of which the accused had been charged with. I therefore accepted the information in this light.

[98] From the evidence of SP32 the information leading to discovery was given by three persons ie the second and fourth accused and SP29. At one stage of the proceedings the defence tried to point the finger at SP29 as being the main informant. SP32 however denied this and maintained that much of the information was given by the second and fourth accused. The information was given individually and also jointly as the three were questioned jointly. I saw no reason to disbelieve this testimony of SP32.

[99] The significance of the information given by the second and fourth accused could also been seen from the fact that on initial investigation at the

farm even using dogs and excavators, the police discovered nothing. This put paid to the theory by the defence, that the police already knew of the discovered items beforehand.

[100] However to me more cogent than the contents of the information given was the conduct in giving this information. The question posed is what inference the court could draw from the conduct of the accused in giving the information?

[101] Section 8 of the Evidence Act renders subsequent conduct as a relevant piece of evidence. Illustration (e) is of particular relevance to this case where it is stated:

> A is accused of a crime.
>
> The facts that either before or at the time of or after the alleged crime A provided evidence … that he destroyed or concealed evidence … are relevant

[102] *Sarkar on Evidence* (14th Ed), at p 151 states as follows:

> The conduct or act of the accused are not dealt with in s 27 and are relevant under s 8 whether such conduct was or was not the result of inducement offered by the police

Further on it is stated:

> What the conspirators did, ie their conduct is relevant under s 8 and it is immaterial whether such conduct was previous or subsequent to the carrying out of the objects of the conspiracy

[103] The only inference that I could make on the conduct of the second and fourth accused in providing the information in this case was that they were in possession of the items found and had tried to destroy and conceal this items by scattering and leaving them at the various places.

[104] I found the suggestion of the defence that the accused had seen the items being thrown therefore knew the location as illogical. There were more than one place the items were found, it is quite absurd to suggest that the second and fourth accused were tailing whoever was throwing the items from one place to another.

Items recovered as a result of the information given by the second and fourth accused and the medical and forensic examination done on the items

[105] The items discovered as a result of the information of the second and

fourth accused and the subsequent examination of the items unraveled the mystery of the missing Sosilawati and company.

Vehicles

[106] Among the items discovered were the two vehicles used by Sosilawati and company to travel to Banting. The fact that the two vehicles were used on the day in question remained unchallenged. Adding significance to the discovery to the two vehicles was the finding of the keys to the vehicles which were found in a drain not far away from the vehicles. There was evidence that the vehicles were lying at the spot for a number of days before being discovered. The finding of the car keys also showed that the vehicles were driven to the spot and left there.

Personal items belonging to Sosilawati and company

[107] Some of the items recovered from the rivers on the information given by the second and fourth accused included hand phones and watches. I accepted the evidence of the family members confirming that the items belonged to their respective family members who were part of Sosilawati's entourage.

Bones

[108] On the information of the accused the police recovered huge number of bones both in the river and on the farm. For the bones found in the river there were bones which had been positively been identified as human bones. However noting that the river had free flowing water and without any DNA that could be possibly done on the bones as testified by the chemist I could not give any weight to this finding of human bones. They could have well been swept into the river from the cremation site which was not very far up stream.

[109] However there were also bones found at a spot on the farm that was pointed out by the second and fourth accused. The photographs of the spot were taken as well as from the evidence of the witnesses I could determine without the need for expert testimony that the spot showed that burning had taken place there.

[110] This was supported by the fact that all the experts called including the doctors and the chemist were in agreement that the bones found on the farm had been subjected to extreme heat. I could make a reasonable inference as the experts had, that the body to whom the bones belonged to would have been burnt with extreme heat.

[111] The bones being burnt was not the bone of contention here as what was disputed and argued by the defence was that the bones could be animal bones as the farm kept a number of animals. No X-ray could be done on the bones as testified by the radiographer as they were too fragmented and charred and a similar reason was given by the chemist that the bones for not being able to do DNA testing.

[112] I however accepted the evidence of SP63 who identified positively that some of the bones were human bones. At the outset it must be stated that this witness was an expert in her field looking at her training, qualification and experience.

[113] I accepted the evidence of SP63 that in determining whether the bones were human bones, the main examination was the morphological examination, the other examinations like microscopic and DNA were only corroborative.

[114] SP63 confirmed positively that there were human bones amongst the bones found on the farm. She highlighted that the main difference between human bones and animal bones were the intricate designs found in the inner side of the bone. SP63 asserted that these intricate designs were discernable from a naked eye examination of the bones. In fact I personally saw these intricate designs when shown by SP63 in court.

[115] The defence contention that SP63 is not an expert on animal bones but only on human bones is frivolous as SP63 has enough knowledge to know the major differences between human and animal bones. There was also no necessity to send the bones to the veterinarian as suggested by the defence as SP63 had positively identified some of the bones to be human bones.

[116] The defence also contended that since SP80 who was the head of department in which SP63 worked had found it difficult to make a definitive finding on the nature of the bones, her testimony carried more weight. To me SP80 in no way contradicted the testimony of SP63 as she had merely made a general statement that it was difficult to ascertain from fragmented bones whether they were human or animal bones.

[117] Even if there were contradictions I regarded SP63 as the real expert on bones as she came across to me as the more experienced and qualified person and the manner she explained in great detail left no doubt in my mind that she knew what she was talking about.

[118] A final point on the discovery of bones was the defence contention that no proper records were kept on the discovery of the bones on the farm.

[119] Contrary to this contention in considering and perusing the evidence of the police and medical team involved in the extraction of the bones I found the excavation to be done in a systematic and orderly manner.

[120] Four separate zones were created and each demarcated properly with a set of police officers and medical officers excavating layer by layer of the soil in each zone. The bones from each discovery were packed separately and marked. It has to be noted that this was not an archeological discovery. Therefore I could not accept many of the suggestions by the defence as to how the bones should have been extracted and how the soil should have been preserved. All this suggestions were only relevant to archeological examination.

[121] Looking at the place under which the bones were found I could infer that the bones were there for only a short period of time as the darkened spot under which the bones were found showed that the fire had been lighted not very much earlier and it ties to the testimony of SP33 that there was a fire on 30 August 2010.

[122] The only questionable aspect of the recovery of the bones was the admission by Supt Soo Mee Tong ('SP48') that he had washed the bones before packaging them. This washing of the bones might have removed important evidence but this would be a loss to the prosecution rather than the defence.

Zinc sheets, cricket bat and swab of blood on the wall

[123] On information of the second and fourth accused the police investigation also discovered zinc sheets at the bottom of a river. Again the defence contented that the the zinc sheets had become degraded as some of the divers were not wearing gloves and upon the discovery of the zinc sheets the wet zinc sheets were stacked on top of one another.

[124] On the non-wearing of protective gear like gloves it was explained by the police divers who retrieved the zinc sheets that it was not practical to do so as the gloves got torn while scouring the river.

[125] The more important issue is whether the manner the zinc sheets were retrieved degraded them to such an extent that no analysis was possible. This was clearly not the case as in this case the chemist managed to obtain sufficient samples for DNA analysis. To me the only effect degradation would have is to have insufficient samples for analysis. To me there was no evidence of any cross-contamination and all the contentions of the defence were mere speculative theories.

[126] There was also a cricket bat pointed out by the second and fourth accused at the farm at the place where the third accused stayed. On the cricket bat there were suspected blood droplets on which cotton swabbing was done. Similarly cotton swabbing was done on the walls of the rooms where the second and thith accused stayed on the farm.

[127] Much hue and cry was made by the defence of the cricket bat being found at the farm as according to the media quoting a senior police officer the cricket was found in a river. The evidence of SP32 and the investigating officer was firm that the cricket bat was found on the farm. On this matter I accepted the evidence of the witnesses before me rather than newspaper reports which could have been erroneous.

[128] When the chemist SP86 did an analysis of all the swabs taken from the zinc as well as the cricket bat and the walls, they clearly matched the DNA to the three members of Sosilawati's entourage.

[129] SP86's expertise on DNA analysis to me was unmatched as he had done numerous such analysis and had the necessary qualification as well had acquired adequate knowledge over the years to do such analysis.

[130] One of the grouse expressed by the defence against the DNA results obtained was the reading on the equipment did not comply with the manufacture's specification. According to SP86 the equipment in the PJ Chemistry Department was set at RFU reading of 50 which was different from that recommended by the manufacturer. According to SP86 this did not go against the international standard in setting the equipment. Each lab was at a liberty to set the standard of the equipment deemed proper. In the absence of any evidence to the contrary I accepted the explanation on this issue.

[131] Putting to rest the issue of DNA analysis it was my finding that proper procedures had been followed in not only analysing the swab samples taken but also in taking of the blood samples from the related persons.

Burnt logs

[132] A final item found as a result of the information given by the second and fourth accused were burnt logs at a place called Batu Arak. The defence contended that that the place where the logs were found was a public place therefore anyone could have thrown the logs there.

[133] I agreed that the place where the logs were found was a public area but

the fact that this particular spot was pointed out by the second and fourth accused erases the inference that somebody had thrown the logs there.

[134] The finding of the logs is also consistent with the evidence of SP33 who saw logs being brought to the farm one day before 30 August 2010. The defence counsel threw aspersions on the logs recovered which at least one of them was huge to point out that it would be impossible for the accused to throw the logs at the place they were found. This argument is untenable as more than one person could have easily hoisted the logs out from a vehicle. If the logs could be unloaded at the farm there is no reason they could not have been thrown at the place where they were found.

Inference to be drawn from the items recovered as a result of the information

[135] Just looking at the items discovered as a result of the information given by the second and fourth accused without looking at any other evidence, a reasonable inference can be drawn of what transpired on the night of 30 August 2010. A reasonable finding could be made that Sosilawati and company had gone to the farm on 30 August 2010 and at the farm they were beaten and finally burnt to death. Their belongings including the vehicles and the items used to burn them were then disposed off at the various spots shown by the accused.

Evidence of SP29 and SP59

Impeachment

[136] I next move on to the evidence of these two very important witnesses for the prosecution. Both were clearly accomplices of the accused in this case as they had pleaded guilty to disposing of evidence related to this case. The evidence they had been charged with disposing off were the remains of Sosilawati and company. SP29 and SP59 had also admitted to the facts of the case which contained statements that Sosilawati and company had been burnt to death at the farm and the ashes disposed off. Both had been imprisoned by the lower court and their sentences were enhanced by the High Court.

[137] Before me both SP29 and SP59 chose to deny any role in their involvement in the happenings on the farm and in fact contended in their testimony nothing untoward happened on the farm either on the 30 or 31 August 2010. Both further alleged that they were coerced into pleading guilty and admitting to the facts of the case.

[138] The prosecution applied to impeach the credit both SP29 and SP59 by highlighting the contradictions in their police statement recorded under s 112 of the Criminal Procedure Code and their testimony in court. I had sight of the contradictions and ruled that the contradictions were material enough to allow for an impeachment proceeding. The prosecution however had to first overcome the hurdle of proving that the police statements were in fact the statement of the witnesses as both of them denied making the statements contained in the s 112 statement.

[139] In line with case authorities I directed a TWT to be held for the statements recorded from each of the witness. I further directed that the purpose of the TWT was limited for the prosecution to show that the statements were recorded in accordance with s 112 of the Criminal Procedure Code. Certain guidelines have been mentioned in s 112 of the Criminal Procedure Code for a police officer to comply with when recording a statement from any person in the course of investigation. To me these guidelines are mandatory to be complied with failing which no weight could be attached to the statement.

[140] From the reading of s 112 to me the it is mandatory for the police officer recording a statement to inform the person from whom the statement is being recorded that the person can refuse to answer any question which would have the tendency to expose him to a criminal charge as stated in the provision as follows:

> (2) Such person shall be bound to answer all questions relating to the case put to him by that officer:
>
> Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

[141] The other mandatory guideline is that the statement must be read back to the person in the language in which he had made it and he be allowed to make correction. The provision states as follows:

> (5) A statement made by any person under this section shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumbprint as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish.

[142] After the TWTI was satisfied that the statement recorded from SP29 was in accordance with the above provision and SP29 did make the statement as tendered by prosecution and I allowed it to be marked as P140 for purposes of impeachment.

[143] I explained in detail more than 20 contradictions in the statements to SP29 with his testimony in court. SP29 understood the contradictions and by way of explanation merely denied what was stated in the statement.

[144] The statement recorded from SP59 I ruled inadmissible as I was not convinced that the statement was read back to the witness after it was recorded thus failing foul of s 112(5) of the Criminal Procedure Code. I therefore disallowed further impeachment proceedings against SP59.

[145] I however allowed the prosecution's application to treat SP59 as a hostile witness allowing the prosecution to cross-examine him. I allowed this application of the prosecution as from my observation SP59 appeared hostile in the manner he answered question by the prosecution. This is in line with the provision of s 154 of the Evidence Act 1950 which reads as follows:

> The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

P711 and P712

[146] In the face of the about turn made by SP29 and SP59 in their testimony in court the prosecution amidst the vociferous objections from the defence made an application to tender the record of proceedings of the Magistrate's Court at Telok Datok where SP29 and SP59 had pleaded guilty to the charge against them and admitted to the facts read to them. The prosecution made the application by virtue of ss 11 and 73 of the Evidence Act 1950.

[147] The defence objected to the application by the prosecution by arguing that there was no provision in the Evidence Act to allow such records being produced. Further the prosecution had given an undertaking at the magistrate's court not to use the records of proceedings in any other proceedings.

[148] As to the undertaking given by the prosecution even if such an undertaking had been given although there was no evidence to this effect, I was not bound by such undertaking as it was strictly given outside my preview. I therefore thought it more apt to just make a decision based on the law. After hearing arguments from both sides I allowed the application of the prosecution by applying ss 11 and 35 of the Evidence Act 1950. The record containing the guilty plea of SP29 was marked P711 and that of SP59 was marked as P712.

[149] Section 11 reads as follows:

> Facts not otherwise relevant are relevant—
>
> (a) if they are inconsistent with any fact in issue or relevant fact;
>
> (b) if by themselves or in connection with other facts that make the existence or non existence of any fact in issue or relevant fact highly probable or improbable.

[150] I took note of the fact that the proceedings in the magistrate's court as it stood was not relevant because the best evidence rule dictates that the witness comes to court to be personally examined. Exception is only made where the witness is dead or unavailable as provided for under s 32 of the Evidence Act.

[151] However in my mind when the witness's testimony is inconsistent with an earlier admission of facts the irrelevant evidence now becomes relevant by virtue of s 11 as enunciated above.

[152] A further point on admissibility is the contention of the SP29 and SP59 that they were coerced into pleading guilty and admitting to the facts of the case. This allegation indirectly throws aspersions against the magistrate for allowing a guilty plea when it was made involuntarily. It is not necessary to summon the magistrate to court to explain the proceeding the law allows a public officer to talk through his records as enunciated in s 35 of the Evidence Act 1950 which reads as follows:

> An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

[153] Further s 77 of the Evidence Act 1950 allows public documents including court records (by virtue of s 74 of the Evidence Act 1950) which are certified in the manner specified in s 76 of the Evidence Act 1950 to be tendered without the necessity of the original being tendered.

Credibility of SP29 and SP59

[154] I assessed the credibility of SP29 based on his s 112 statement and P711 whereas for SP59 I based it on P712.

[155] Clearly SP29 failed to explained the material contradictions between his police statement and his testimony in court and on this reason alone I determined that SP29 was a witness not worthy of any credit.

[156] On perusing P711 and P712 it was apparent that the learned magistrate had taken adequate precautions in ensuring that both the witnesses had pleaded guilty voluntarily and had also admitted to the facts voluntarily. This was so noted in both records of proceedings. A

[157] SP29 and SP59 were therefore clearly telling lies in my court and I ruled both were not worthy of any credit. The effect of my ruling rendered the oral testimony of both SP29 and SP59 as what transpired on the farm on 30–31 August 2010 to be worthless and of no value. B

Probative value of P711 and P712 C

[158] Having admitted P711 and P712 as evidence in my opinion I was not barred from considering the admissions made by SP29 and SP59 made to the facts in the proceedings. Although both SP29 and SP59 were accomplices s 133 of the Evidence Act endorses accomplices as competent witnesses. Section 133 reads as follows: D

> An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. E

[159] In my mind the record of the facts cannot form a basis of conviction against the accused. The most the facts could corroborate is the fact that Sosilawati and company had been burnt to death. At this stage I accepted the record of facts an additional corroborative fact as the inference of Sosilawati being burnt to death could be made even without this corroborative fact. F

Motive and conduct of the first accused

G

[160] It is trite law that in a charge of murder motive is not a deciding factor. The prosecution is not duty bound to prove a discernable motive for a murder rap to stick. The determinant factor for murder is the intention to cause death.

[161] Nevertheless presence of motive makes the offence of murder more probable as it is seldom a person takes another's life unless there is a compelling reason to do so. H

[162] Motive like intention is a matter of mind which can be inferred from the surrounding circumstances as well as antecedent facts connected closely to the incident. I

[163] In this case the intention Sosilawati wanted to meet the first accused was to bring forward the payment on two cheques issued by the first accused.

The prosecution led evidence that the first accused had insufficient funds in the bank to honor these cheques. This was a compelling reason to kill Sosilawati as the sum involved was quite big. The others with Sosilawati had also to be killed as they would have spilled the beans if left free.

[164] Counsel for the first accused contended that conduct of the first accused after Sosilawati went missing belied innocence rather than guilt. The first accused did not try to escape even when his farm hands were arrested. To me however the fact that the first accused remained silent in the face of intense suspicion towards him shows guilt rather than innocence. The first accused being a lawyer and not a country bumpkin should have taken immediate steps to clear his name rather than evade the law. This conduct speaks volume of his guilt rather than innocence.

Common intention

[165] In this case all the four accused were charged with common intention under s 34 of the Penal Code. Section 34 of the Penal Code reads as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act was done by him alone.

[166] The significance of this provision is that in a case where more persons than one are charged for murder it is not necessary to prove who delivered the fatal blow.

[167] The main requirement for this provision to apply is that there must be a pre arranged plan and the execution of this pre arranged plan. In the case of *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603 it was stated as follows:

> It is settled law that s 34 is a rule of evidence and does not create a substantive offence. Simply put it is a statutory recognition to the common sense principle that if more persons than two persons intentionally do a thing jointly it is just the same as if each of them had done it individually. It is an embodiment of the concept of joint liability in doing the criminal act based on common intention. Hence, an accused person is made responsible from the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act.
>
> The existence of common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inference have to be relied upon arising from such

> acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available …
>
> For a charge premised on common intention to succeed it is essential for the Prosecution to establish by evidence direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s 34 notwithstanding that it was pre arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence

[168] In this case Sosilawati surely would not have gone to Banting and more so to the farm unannounced. It can be readily inferred that it was the first accused who would have lured Sosilawati to the farm after being informed by Sosilawati of her intention to see him.

[169] SP33's evidence shows that there was an indication from the first and the fourth accused of arrivals of guest to the farm. There was also a delivery of the logs to the farm a day earlier and also of buying of kerosene. Even in the absence of any evidence the farm was well placed and equipped to carry out the crime committed as according to SP33 fires had been lighted before at the farm.

[170] It is not necessary for long drawn plan in this case as the second to fourth accused worked at the farm for the first accused and the plan to kill could have developed even after the arrival of Sosilawati and company.

[171] The manner in which Sosilawati and company were burnt to death leans towards a pre arranged plan orchestrated by the first accused and carried out by the second to fourth accused bringing into action the provision of s 34.

Similar facts

[172] Another issue that needed to be addressed in this case was an attempt by the prosecution to adduce evidence of similar facts. The prosecution called two witnesses Samson Nahar bt Mohd Dali ('SP96') and Usharani Sethuram ('SP101'). The testimony of this witnesses showed that both their husbands had business and legal dealings with the first accused. Both the husbands had informed their wives that they were on the way to meet the first accused. Both were now missing till to date. Attempt to trace them by questioning the first accused drew a blank.

[173] Prosecution tendered documents to show that there were business dealings with the missing husbands with the first accused. In relation to the husband named Syafik a bank document in his name was found in the first

accused pickup truck whereas a power of attorney under the name of the other husband Muthuraja was also found in the possession of the first accused.

[174] SP33 was shown a photograph of both the husbands and confirmed that she had seen both this persons on the farm. She had also seen a big fire on the day this persons came to the farm.

[175] In the Federal Court case of *Ismail v Hasnul*; *Abdul Ghafar v Hasnul* [1968] 1 MLJ 108 Raja Azlan Shah J (as His Highness then was) held that s 11 of the Evidence Act 1950 could not be so widely read as to include collateral matters that have no bearing at all on the fact in issue or relevant facts. There must be some proximate connection between the collateral matters and issues before these matters may be adduced under s 11.

[176] Augustine Paul J (as His Lordship then was) in *Public Prosecutor v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1, at pp 174–175 stated:

> Be that it may be, it must be observed that s 11 must be construed as being limited in its operation by s 54. So construed s 11 renders inadmissible the evidence of one crimefnot reduced to legal certainty by a conviction) to prove the existence of another unconnected crime, even though it is cognate

[177] In my mind the evidence adduced by the prosecution alone and even taken together could be nothing more than a coincidence which did not qualify them to be considered as similar facts evidence. I therefore did not give any weight to this evidence adduced.

Adverse inference

[178] The defence sought to draw adverse inference against the prosecution for not calling a number of witnesses. Amongst the witnesses whom the defence contended that the prosecution should have called was the chemist who did a soil sample analysis of the soil from the tyres of the cars at the farm as well as the cars belonging to Sosilawati and company. The other witnesses not called were the other occupants of the farm who were present on the farm on the 30–31 August 2010.

[179] It is to be remembered that the non calling of a witness alone does not attract adverse inference as stated in the case of *Public Prosecutor v Datuk Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 at p 28:

> Without going into detail, it is sufficient for me to say that an adverse inference against the prosecution can be drawn on if it withholds certain evidence and not merely on account of its failure to call certain evidence. In my view, it is a

misconception to speak of the prosecution as having a duty to the accused to call all witnesses who will testify as to the events giving rise to the offence charges

[180] To me in this case there was no suppression of the evidence of the chemist or the occupants of the farm. Their identities had been revealed during the trial. The case of *Samsudin v Public Prosecutor* [1962] 1 MLJ 405, at p 407 stated that:

The defence, of course, would have much preferred them to be offered for cross examination but in our opinion the prosecution were under no duty to take this course and it was sufficient that they made known to the defence the availability of these witnesses if they required them

[181] I ruled that no adverse inference can be drawn by the non calling of these witnesses and the non calling of these witnesses did not hamper in any way the narrative of the events as led by other evidence.

DECISION AT THE END OF THE PROSECUTION CASE

[182] It is often stated that the prosecution has the onerous task of proving its case in a criminal trial but to me the court bears a more onerous task of determining whether the prosecution has proven its case.

Prima facie

[183] The procedure to be complied with at the end of the prosecution case is contained in s 180(1) of the Criminal Procedure Code which reads:

When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

[184] What is prima facie is defined in s 180(4) of the Criminal Procedure Code as follows:

For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[185] The role of the court and explanation of what can be regarded as prima facie has been expounded in countless cases and suffice for the purposes here that only two cases are quoted.

[186] Augustine Paul J (as His Lordship then was) in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 explained as follows:

> A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As the exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence

[187] In the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 at p 317; [2005] 1 CLJ 85 at p 100 it was stated that:

> the test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out.

Circumstantial Evidence

[188] Circumstantial evidence as opposed to direct evidence is allowed and regarded as sufficient under the law to prove a case and sustain a conviction. To me direct evidence for the purposes of this case would be where a witnesses testifies seeing an offence happening before his eyes. There was such a witness in this case in the form of SP59 but unfortunately his evidence was discredited in this case and his admission to the facts of seeing Sosilawati and company being killed in another proceeding could not be considered as direct evidence for the purposes of this case.

[189] The court was therefore left with circumstantial evidence in determining whether the prosecution had proven a prima facie case. What amounts to sufficient circumstantial evidence was very aptly put by Lord Cairns in the case of *Belhaven and Stenton Peerage* as quoted in the case of as follows:

> My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united form of all the circumstances put together. You may have a ray light so feeble and that by itself will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavoring to dispel

Charge And The Ingredients

[190] Murder is defined under s 300 of the Penal Code and consists of four limbs and five exceptions. Suffice for the purposes here if the illuminating statement of Abdul Hamid Mohmmad JCA (as His Lordship then was) is quoted from the case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489:

> Even in a murder trial, the dead body is not produced in court. In *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 (FC) the body of the victim was not even recovered, yet the accused was convicted of murder. What the prosecution has to prove is that a particular person had died and the accused had caused his death. The death of the victim is not proved by looking at his remains in court, but by evidence of witnesses, the medical report, the identity card, the photographs and so on.

[191] Guided by the provisions of law it is my decision that the prosecution through a combination of surrounding evidence in the form of testimony of family members, telecommunication records, testimony of credible witnesses helped by the inferences made from the conduct of the accused in the discovery of exhibits as well as forensic and medical evidence have successfully proven all the ingredient of the charge of murder under s 302(a) of the Penal Code, to a standard if unexplained by the accused can lead to their convictions.

[192] I therefore called upon all the four accused to enter their defence on all the four charges against them.

DEFENCE OF THE ACCUSED

[193] All the four accused chose to give evidence under oath and also called a total of 26 other witnesses.

Evidence of the first accused

[194] The first accused at the beginning outlined his movements in the evening of 30 August 2010 by stating that he had gone to his mother's house as well as had gone with an estate agent to view some land. At 8.30pm the fourth accused had drove him to Subang Jaya to meet a friend.

[195] The accused admitted that the farm belonged to him but he did not go to the farm on the 30 August 2010. He further testified that he had not met Sosilawati and company at the farm on 30 August 2010 and Sosilawati had not seen him on that day. The first accused stressed that he had no hand in the disappearance of Sosilawati.

[196] The first accused confirmed that he was the lawyer for Sosilawati in a land transaction in Penang. Apart from that he had an interest in the purchase of the land having taken out money. He also was the lawyer for another company belonging to Rahman Palil for the same piece of land and had also an interest in the this land transaction.

Evidence of the second and third accused

[197] The second and third accused testified that they were on the farm on 30 August 2010. Both confirmed that the first accused was the owner of the farm although their dealings were mostly with the fourth accused. The fourth accused paid their salary and supervised and directed their work on the farm.

[198] Both the accused testified that the first accused did not come to the farm on 30 August 2010. They further testified that nothing untoward happened on the farm on 30 August 2010. Both of them together with the fourth accused and SP29 and SP59 did gather at the farm around midnight to hoist the Malaysian flag and light a small fire to celebrate Merdeka. After the celebration they ate and slept till the next morning.

[199] The next morning the second accused went to his grandmother's house and returned only in the evening. The defence called the second accused grandmother Angamah a/p Rengasamy ('SD13') who confirmed that the second accused did visit her on the morning of 30 August 2010 and was in her house till evening.

[200] The third accused testified that he carried out his routine duties on the 31 August 2010 and nothing unusual happened on the farm on 31 August 2010.

Evidence of the fourth accused

[201] The fourth accused testified he stayed on the farm which belonged to the first accused. His role on the farm was however limited to construction work on the farm. He only supervised the workers involved in construction works. The rest of the farmhands including the second and third accused were under the direct supervision of the first accused. The fourth accused also testified that the second accused acted as a bodyguard for the first accused.

[202] On the 30 August 2010 according to the fourth accused that Sosilawati and company did come to the farm to meet the first accused. The first accused was also on the farm on that day. The fourth accused further testified there about four or five people besides Sosilawati who had come at the same time. The fourth accused heard a quarrel in one of the premises and went

he went in to see he saw Sosilawati's driver being beaten. Later he saw the lawyer also being beaten. The fourth accused also heard the first accused giving instructions to the second and third accused to kill the driver and the lawyer.

[203] Finally he saw Sosilawati and company with a few others being bundled to the neighbouring farm. The next morning he saw the persons bundled to the neighbouring farm being brought back to the farm by the second and third accused. On the farm he witnessed the three person accompanying Sosilawati being burnt on an arrangement of logs at the location and marked on the sketch plan.

[204] The fourth accused also testified that the first accused had made attempts to cajole him to accept what had happened and asked him and the second and third accused to keep silent on the matter. The first accused also prepared them to face a possible arrest by the police and indicated that they could cooperate with the police as later they could retract from any statement to the police by claiming that they had made the statement under force.

Evidence against the admission of SP29 and SP59

[205] Apart from the testimony of the four accused the defence called a number of witnesses to show a general conspiracy by the prosecution, the police and police friendly lawyers to coerce and deceive SP29 and S59 to plead guilty and admit to the facts which were related to this proceedings.

[206] The defence first called Kandasamy a/l Nadesan ('SD15') who testified that on the arrest of his son SP59 he had engaged the services of Avtar Singh a/l Sukhdev Singh ('SD9') and had all along intended that SD9 defend his son even in the event his son was charged.

[207] SD15 however was summoned to the KL Police Contingent Head Quarters and persuaded to appoint a lawyer whom the police recommended if he wanted his son to be freed. He was then pressurised to sign the warrant to act authorising the lawyer recommended to act for his son.

[208] He was later informed a team of lawyer had been assigned to defend his son at the proceedings at the Magistrate's Court Teluk Datok. At this point of time SD15 had a change of heart and wanted to revert to SD9. SD15 spoke to his son to convince him to revert back to the earlier lawyer but his son refused.

[209] SD9 corroborated the testimony of SD15 and elaborated of how he was unceremoniously dumped in favor of another team of lawyers and he only

discovered this when he attended the court in the morning of the proceedings in the Magistrate's Court Telok Datok.

[210] SD28 ACP Abdul Aziz Zakaria the center of the allegation of defence admitted that he had recommended an acquaintance by the name of Rosli Sulle ('SD30') to defend SP29 and SP59 when the latter had come to his office to meet him on an unrelated matter.

[211] SD30 confirmed that he had acted for SP29 and SP59 with another lawyer by the name of Puravelan but he contended that he did so with explicit and written agreement of both the accused and also their families.

Evidence against information leading to discovery

[212] The defence on continuing their objection to the admissibility of the information leading to discovery called a number of police personnel who had made entries in the lock up register. The purpose was to show that the oral testimony of SP32 and his team contradicted the entries in the lock up register and therefore their testimony should be reviewed. Further the movements in and out of the lock up showed that the accused were kept away for long period of time.

Evidence of Pavithra a/p Sundran (SD26)

[213] SD26 was an occupant of the farm who was present on the farm on the material date of 30–31 August 2010. SD26 testified that she was sent to the farm by her parents to be under the surveillance of the fourth accused a move aimed at curbing further association with her boyfriend whom her parents apparently disapproved.

[214] While at the farm her movements were restricted by the fourth accused who had directed she remained indoors all the time unless called. She confirmed that SP33 was also an occupant of the house working as a maid. SD26 gave evidence that nothing untoward or unusual occurred on the night of 30 August and she and SP33 had as usual prepared dinner at the kitchen of the house. SD26 contended she did not hear anything on the night of 30 August nor saw any fire outside the house. Similarly the next day 31 August there were no unusual activities at the farm.

Evidence of chemist Svibalah a/l Nagayah ('SD20')

[215] SD20 was government chemist who was tasked with analysing soil samples from the tyres of the vehicles handed to him by the police. He

confirmed that he was not requested or directed to carry out comparison studies of the soil samples taken from the tyres of the car with the soil samples taken from the farm. When question on the changes in soil sample in the vent the soil was burnt he admitted he was not an expert in that field.

Evidence of Balasubramainam a/p P Chinaswamy ('SD12')

[216] The defence called an expert of their own in the form of a person who carried out the Hindu cremation ritual carried out in open air. He gave detailed testimony how the cremation took place and the aftermath of the cremation. SD12 also testified that he cremated a single body at a time although there were rare request for a parent and a child be cremated together. According to him it would be impossible for more than one body stacked on top of another to be burnt effectively. SD12 also testified that he used rubber wood to cremate one of the reasons being that it was easily available at the area and used cheap fuel to reduce cost.

EVALUATION OF THE DEFENCE EVIDENCE

[217] It is trite law that there is no burden upon the accused persons prove their defence or even lead evidence to establish their defence. Nevertheless if s 180 of the Criminal Procedure Code is to be scrutinised the defence does bear a duty to rebut or explain the prosecution evidence. Non explanation will lead the defence to be regarded as a mere denial.

[218] The duty upon the defence has been termed as evidential burden as stated in the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 at p 316 it is stated as follows:

> Prove beyond reasonable doubth involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubth the other is the evidential burden on the accused to raise a reasonable doubth.

[219] It is therefore not enough for the defence to sit back and poke holes in the prosecution case without taking a more affirmative effort in leading evidence to explain the facts that are clearly stacked against it.

[220] At the end of the prosecution case the court in this case had made a certain finding of facts and the defence is permitted to attack this finding of facts. The defence did in this case in an attempt to convince the judge to review his earlier stand. The more effective method would be for the defence to lead evidence to convince the court to relook its earlier decision.

[221] The defence started off by singing the same old tune that the judge

when calling for the defence was influenced by media hype. In answer to this allegation it must be reiterated that a judge faces a greater danger from an eloquent defence attorney or relentless prosecutor. Both are skillful in diverting the judge's attention to the factors which favor them but blissfully ignore the factors which are against them.

[222] In this case I chose to ignore the media while at the same time being wary of eloquence of the defence counsel which was abundant in this case and the relentlessness of the prosecutor. I chose to evaluate the evidence as adduced by the defence as well as the evidence of the case as a whole in conforming to legal principles and drawing reasonable inference wherever necessary.

Evidence of the accused

Amongst themselves

[223] It is glaringly obvious that the defence of the accused was not untied especially between the first three accused and the fourth accused. The prosecution termed it as a 'dog fight' quoting from the case of *Public Prosecutor v Lim Teik Seng* [1985] 2 CLJ 61 which mentioned as follows:

> In passing I would pause to remark, that as often happens when there is a dog fight between defendants in a criminal trial — and by this I mean where one defendant in the course of his evidence puts forward a defence which constitutes an attack upon his co-defendant, as happened in this case, so far as the second and third accused persons were concerned-the result are usually disastrous for both

[224] In this case the first accused testified that at about 8.30pm on 30 August 2010 he was taken by the fourth accused to see a friend at Subang Jaya. This was flatly denied by the fourth accused who testified that he never left the farm the night of 30 August 2010 and therefore adverting that the first accused was lying on this matter.

[225] The first accused together with the second and third accused contended that the first accused was not on the farm the night of 30 August 2010 and he did not meet Sosilawati and company on the farm that night or any time after.

[226] The fourth accused again traversed this claim by admitting that Sosilawati did come to the farm on 30 August 2010 and did meet the first accused. Both the second and third accused were present.

[227] The first accused together with the second and third accused also testified that nothing untoward or unusual happened on the farm on 30 August

2010 or 31 August 2010. This evidence was again repelled by the fourth accused who testified that on the night of 30 August 2010 Sosilawati's driver was beaten up and also the laptop belonging to one of the members of Sosilawati and company was destroyed and further he saw Sosilawati and company being bundled off to the neighboring farm. The next day the fourth accused saw the three persons who had come together with Sosilawati being laid on logs and burnt.

[228] In the face of such diversity between the evidence of the accused the court could choose to disbelieve the evidence of all the accused and accept the version of the prosecution. The defence sought to explain this diversity in evidence to the fact there was a fall out between the first accused and the fourth accused when the first accused had rejected a request of help from the fourth accused. This could be true but it still does not explain the diversity in evidence bearing in mind especially that some portion of the evidence of the fourth accused is consistent with the prosecution's evidence.

[229] In this case in the face of diversity of evidence I chose to disbelieve the evidence of the first three accused that nothing transpired on the farm on 30 August 2010 in relation to Sosilawati and company. I made an affirmative finding of fact that Sosilawati and company were on the farm on the 30 August 2010 and that all the four accused did meet Sosilawati and company on the farm that night.

[230] As against the fourth accused I chose to believe that portion of his evidence which was consistent with the prosecution's evidence. This included the prosecution's evidence on the coming of Sosilawati and company on the farm, the fire being lit on the farm to burn at least three members of Sosilawati and company and members of Sosilawati and company being beaten on the farm on 30 August 2010.

Evidence of the fourth accused

[231] The evidence of the fourth accused deserves a separate evaluation as it brings out a version that is different from either the defence or prosecution's version. The thing that struck me most of the testimony of the fourth accused was the manner in which the evidence was crafted to portray the innocence of the fourth accused and distance him from all the criminal activities which he said happened on the farm on 30–31 August 2010.

[232] I agreed with the suggestion of one of the counsels that the fourth accused had manipulated the evidence to suit his own case. The fourth accused was present during the major part of these proceedings and had listened to the evidence of the various witnesses. It was not difficult for him to tailor his own

evidence to his favour. Further being a co-accused it would be to his advantage to incriminate the others to save his own skin.

[233] Taking these factors into consideration it was clear that not the entire evidence of the fourth accused could be believed. As I have stated earlier that those portions of evidence supported and consistent with the prosecution's evidence could be accepted.

[234] The other portion of the evidence of the fourth accused stating that the night of 30 August 2010 more than four people apart from Sosilawati and company had come to the farm to a total of nine to 11 people was unbelievable especially in the light of the subsequent evidence of the fourth accused this people together with Sosilawati and company were overpowered and confined to the neighbouring farm. I could not see how the three farm hands could have overpowered such a large number of people.

[235] To me the entire evidence that this group of people were bundled off by the first to the third accused to the neighboring farm was itself unbelievable as certainly such a big group could not have been kept overnight without attracting any attention. Further the police investigation did not show any involvement of the neighboring farm.

[236] I regarded the evidence of this group of people to the neighboring farm to be an invention of the fourth accused and a way out of incriminating himself from the events occurring on the farm on 30 August 2010. This becomes clear from the fact that had he testified that the murders took place on the 30 August 210 he would be incriminated as he was on the farm the entire night. Whereas if he testified that the murder took place the next day 31 August 2010 he would have an alibi as he had testified that he left the farm the next day to go to town at least three times thus implying that the murder took place while he was not on the farm.

[237] The fourth accused testimony that he saw Sosilawati alive a week later was an attempt to divert the attention of the proceedings to another direction. I had observed him closely when he testified to this fact. Clearly his testimony on this matter was unconvincing and during cross-examination when he was cross-examined on this matter by the DPP he appeared fidgety and evasive. Further if the fourth accused had actually seen Sosilawati alive this is the first thing he would have blurted out to the police instead of giving information leading to discovery of the items belonging to Sosilawati.

[238] The more important point is that according to the fourth accused he was led to the place where he saw Sosilawati by the first accused who had in fact

met Sosilawati. Surprisingly such an important fact was never mentioned by the first accused in his testimony. The fact that Sosilawati was alive was clearly a concoction by the fourth accused.

[239] There was however one portion of the evidence of the fourth accused which had not been revealed earlier at any time during the proceedings but which the fourth accused testified in length and detail. This was with regards to the aftermath of the events on the farm and the time when the news of the missing Sosilawati had spread like wild fire. According to the fourth accused in order to quell his uneasiness and that of the second and third accused the first accused had met them a number of times and pacified them that nothing would happen to them and in any event he was there to protect them.

[240] The first accused assured them there was nothing to fear even if they were arrested as he was a criminal lawyer and knew the working of the law. The first accused went as far as to say the three accused could cooperate with the police and later on they could retract whatever statements they had made incriminating themselves by alleging force on the part of the police.

[241] This portion of the evidence of the fourth accused I believed totally as it was given by the fourth accused spontaneously and without much prompting. In believing this evidence the following inferences and findings could be made.

(i) Common intention

[242] The subsequent calling of the meetings by the first accused showed that there were earlier meeting before the killing of Sosilawati and company between the fourth accused therefore strengthening the case for common intention by the four to kill and dispose the remains of Sosilawati and company. This fact also threw water on the testimony of the first three accused that there was seldom any communication between them besides the normal courtesies when the first accused visited the farm. The subsequent meetings showed a clear meeting of mind of the four accused.

(ii) Guilty conduct

[243] The subsequent conduct is a relevant fact as it reflects the earlier intention of committing the crime. In this case the first accused in conducting the meeting with the three accused on ways to evade being incriminated shows absolute guilty conduct which is more incriminating than flight after commission of the offence. This subsequent conduct of the first accused seeks to repel the contention of counsel for the first accused that the fact that the first accused did not run away reflects innocence.

[244] Being part of the meeting with the first accused reflects guilty conduct on the part of the other three accused. If they were innocent especially as alleged by the fourth accused they would have not been part of the meeting and come forward to assist the authorities.

(iii) Information leading to discovery

[245] This evidence of assurances by the first accused answers the query of the defence counsel why the second and fourth accused chirped like birds when questioned by the police. It was the contention of the defence that the second and fourth accused would not have given information if they were not manhandled. It is clear now that the second and fourth accused had given information voluntarily with the intention later on to allege force on the part of the police.

Evidence of the accused against the other evidence led by the prosecution

Evidence of family members

[246] The first accused gave no explanation that the family members were mistaken or telling lies when testifying that Sosilawati and company had gone to Banting to meet him. The first accused led no evidence that the Sosilawati could not have possibly come down to Banting to see him. In fact the first accused made no attempts to deny that he had issued the cheques to Sosilawati. In the light of bare denial the testimony of the Sosilawati's daughter SP15 stands that Sosilawati had gone to Banting to meet the first accused.

Evidence of telecommunication

[247] The defence led no evidence to counter the data contained in the telecommunication records or produce records of their own to show that the data in the telecommunication record was false or inaccurate. I therefore have no reason to disregard the telecommunication records which charts the journey of Sosilawati and company right to the farm. The evidence the family members of the various calls made to Sosilawati and company still stands.

Evidence of SP33 as compared with evidence of SD26

[248] I found that the evidence of SP33 of what happened on the farm on 30 August 2010 was not dislodged by the evidence of SD26.

[249] From my observation SD26 was an undependable witness who was kept on the farm in a manner akin to house arrest. She was apparently terrified

by the fourth accused and her fear for the fourth accused remained up to her testimony in court. It was apparent that SD26 was evasive and attempted not to divulge any information incriminating the four accused. She definitely was hiding something and purposely refused to divulge any information. This was clear when she testified that she remained indoors all the time behind closed doors and windows and oblivious to what happened outside the house she was staying.

[250] Between the two witnesses I chose to believe the testimony of SP33 as to what she saw and heard on the night of 30 August 2010.

Evidence leading to discovery

[251] The defence led no new evidence for me to reconsider my earlier ruling on the information leading to discovery. I was satisfied that all allegations raised by the defence were sufficiently covered and answered during the TWT. I therefore stuck by my decision to accept the evidence leading to discovery and all the inference attached to such information given.

Evidence of admissions of SP29 and SP59

[252] The matter which peeved the defence the most in this case was the court's ruling allowing the records of proceedings in the Telok Datok Magistrate's Court to be admitted. The records contained the admission of guilt on the charge and admission of facts by SP29 and SP59.

[253] The facts as admitted by SP29 and SP59 clearly showed the fate of Sosilawati and company on the farm on 30 August 2010. It showed that Sosilawati and company were killed on the farm their bodies burnt and their ashes disposed off.

[254] I had allowed these records to be admitted by virtue of ss 11 and 35 of the Evidence Act 1950 for the prime reason to show that SP29 and SP59 were lying in their testimony before me in their claim that they were forced to plead guilty for offences that they had not committed. The court in no way admitted these records to prove the charge against the four accused in this case.

[255] By perusing these records the court was satisfied that nothing in the records showed that SP29 and SP59 had pleaded guilty under any form of pressure on the converse it showed that SP29 and SP59 had pleaded guilty and admitted to the facts voluntarily.

[256] In making the finding that SP29 and SP59 had pleaded guilty and

admitted to the facts voluntarily a reasonable inference could be made that they had actually committed the offence for which they were charged.

[257] The facts which SP29 and SP59 had admitted included the facts that Sosilawati and company had been killed and burnt on the farm on 30 August 2010. These facts corroborated the other evidence led by the prosecution in this case on the fate of Sosilawati and company on the farm. The defence contended that for this very reason that is, the prosecution wanted to use this admission against the four accused, the prosecution had conspired with the police and the defence counsel into deceiving SP29 and SP59 in pleading guilty and admitting to the facts.

[258] The defence in support of their contention called SD28 and SD30. From their evidence it was clear that SD30 had been roped in to defend SP29 and SP59 at the behest of SD28 a senior police officer and deputy head of the Criminal Investigation Division of the Kuala Lumpur Police Contingent.

[259] In my opinion after observing the testimony of these two witnesses, I concluded that there was no ulterior motive on the part of SD28 in recommending SD30 to defend SP29 and SP59 although SD28 went beyond his call of duty in doing so. It would have been more prudent on the part of SD28 to refrain from involvement in the defence of SP29 and SP59 when his own subordinate officers were involved in investigating the case for which both SD29 and SD59 were going to be charged in court.

[260] On the part played by SD30 I was satisfied that he was telling the truth when he clarified that he went to the police contingent headquarters to meet SD28 on other unrelated matters and it was by chance the case of SP29 and SP59 was mentioned to him. SD30 had also prepared the necessary documentation to be appointed counsel by getting the written consent of SD15.

[261] The most important fact however that SD30 was properly appointed was the testimony of SD15 that when he inquired from SP59 about the matter SP59 had assured him that he wanted SD30 to represent him. The accused has a final say in the appointment of his lawyer.

[262] I disbelieved the testimony of SD15 that the only reason why he agreed to the appointment of SD30 was because he was assured by the police that his son would be freed if he accepted a police appointed lawyer. It would be very naive for SD15 to believe such a promise knowing that SP59 faced serious charges.

[263] Similarly it would be preposterous for SP29 and SP59 to believe that

they would be freed if they pleaded guilty to the charge and admitted to the facts against them. They might have expected a lighter sentence but certainly not to be freed. In the same vein they would not have pleaded guilty if they had not committed the offence for which they had been charge knowing the seriousness of the charge.

[264] The defence further contention that the case against SP29 and SP59 was speedily disposed of on the very same day showed that there was a conspiracy, is unsustainable. If this were true than the learned magistrate would also be a part of the conspiracy as only the magistrate can determine whether he wanted to dispose of the case the same day.

[265] Returning to the facts of the case in the proceedings before the magistrate's court the defence contended that the facts did not support the charge insinuating that SP29 and SP59 were wrongly convicted. It was not incumbent upon me in this case to determine whether the facts against SP29 and SP59 supported the charges against them as they were a matter of a separate proceedings and the matter had already been dealt with by another High Court.

[266] Next I considered whether the facts contained in the records which had been marked P711 and P712 had any probative value to the case before me. On the matter raised by the defence that SP29 and SP59 being accomplices their admission could not be accepted. This contention flies against s 133 of the Evidence Act 1950 which state:

> An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[267] At the end of the prosecution case I had ruled that the only probative value of the facts against SP29 and SP59 was that it showed that Sosilawti and company had been killed on the farm and burnt and their remains disposed off.

[268] At the end of the defence it is my further ruling based on the cross-examination of the accused by the prosecutors admitting that they were the only persons with such name on the farm the names of the second to the fourth accused mentioned in the facts could only be referring to them.

[269] As a final piece on this issue I was satisfied that the facts contained in P711 and P712 were cogent evidence against the accused but on its own were insufficient to sustain a conviction against the accused. I would in fact go as far to say that even without P711 and P712 the prosecution had led sufficient

circumstantial evidence against the accused.

Evidence of expert

[270] The defence called no evidence of the expert of their own to counter the evidence of the experts called by the prosecution in the form of the medical and chemist evidence. Without any expert evidence to the contrary I found no reason to disregard of the medical evidence of the finding of human bones on the farm or the matching blood sample found on the zinc, cricket bat and the walls on the farm.

Evidence of the expert cremator

[271] The defence called as an expert a person SD12 who had been exposed to the procedures of open air cremation according to Hindu rites from the age of six. I had no doubt in my mind that SD12 was an expert in Hindu cremation rites. This could not however be stretched to include expertise in all open air burning.

[272] This was evident from the answers of SD12 that he carried out the cremation on a commercial basis to earn a living and therefore he used the most economical and easily available items. I observed that SD12 used rubber wood to do the cremation not because of any intrinsic burning value but more because it was easily available at the place he carried out the cremation.

[273] In short I could not accept SD12 as an expert in determining which material was the most suitable to carry out open burning. His answers that the logs recovered by the police on the information given by the second and fourth accused were not suitable for open air burning were his own personal view and could not be accepted as the views of an expert.

[274] It would be insulting the intelligence to rule that based on the evidence of SD12 no open air burning could have been carried out on the farm on 30 August 2010. The finding of burnt logs, the charred remains of soil, the presence of fragmented burnt human bones and burnt zinc pieces with blood spots could only mean there was burning of bodies on the farm.

[275] To rely on the evidence of SD12 to prove that after the cremation that bone pieces will remain on the ground and not seep into the ground as contended by the defence as happened in this case is untenable. The simple answer would be if the ashes of the remains could be thrown away so could the remaining bones be dug underground.

[276] A final point on the evidence of SD12 is his testimony that it would be impossible to burn one body on top of another as happened in this case. According to SD12 the bodies should be burnt separately for the bodies to be burnt fully. In his own experience he has only burnt one body on another on the request of family members and that too involving the burning of the father and his child. Again I found this evidence of SD12 to be his personal view. There is no evidence that he had experimented with burning of a body one on top of another.

[277] In my mind it might take a longer time in burning of a body over another but I could not accept that it could never be done. The events in this case show that such burning did take place as testified by the fourth accused that he saw three bodies lying one on top of the other after which they were burnt.

Motive

[278] I had mentioned at the end of the prosecution case that a possible motive to kill Sosilawati could be the fact that the first accused had insufficient funds to honour the cheques issued to Sosilawati.

[279] In his evidence in court the first accused unwittingly spilled out a more cogent reason to commit murder. The first accused testified that for the same piece of land in Penang he was acting for both Sosilawati and Rahman Palil on two separate deals, both of which he had an interest in. He would stand to benefit more in the deal with Rahman Palil as the value of the land had sky rocketed.

[280] That was not the problem as the more serious problem was that Sosilawati might have had got a wind of this double dealing and maybe even as to increase value of the land. According to the first accused he was reluctant to organise a meeting between Sosilawati and Rahman Palil.

[281] To me the reason for this was apparent as the first accused was caught between the devil and deep blue sea. On one hand was Sosilawati a well known entrepreneur and on the other hand in the words of the first accused a powerful politician. One of them had to be eliminated for the well being of the first accused and the person unfortunately was Sosilawati. The persons accompanying Sosilawati were merely at the wrong place at the wrong time.

Opening statement

[282] A final point that needs mention is the issue raised by the defence that the prosecution had failed to stick to the facts mentioned in the opening statement when leading evidence in this case.

[283] In my sighting of the opening statement I did notice there were instances of departure from what was stated in the opening statement. There were also names of witnesses mentioned in the opening statement who were not called and numerous other witnesses whose names were not mentioned were asked to testify.

[284] The requirement for an opening statement in the High Court is stated in s 179(1) of the Criminal Procedure Code which reads:

> The officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused.

[285] This requirement is in contrast to the summary trial procedures in the lower court where the prosecution need not open the case. This is provided for under s 174(a) of the Criminal Procedure Code.

[286] To me the provision on opening statement is a rule of procedure rather than a rule of evidence. I also regard it as of directory in nature rather than mandatory in nature although the word 'shall' is used. The purpose of the opening statement is merely to inform the court of the extent and expanse of the evidence of the prosecution. It may also a notice to the defence on the likely evidence that they are to face.

[287] To me there is no law to confine the prosecution to the perimeters of the opening statement. The prosecution is at liberty to venture beyond the opening statement if there are valid reasons to do so. As an illustration in this case the prosecution could not have foreseen that their two witnesses would turn against them. This had prompted the prosecution to call additional evidence. Similarly matters may have arisen during cross-examination of witnesses requiring further evidence.

[288] On this issue it is my decision that the prosecution departure from their opening statement did not in any way impact their case adversely and also in no way was it prejudicial to the defence case.

FINDING AT THE END OF THE WHOLE CASE

[289] The duty of the court at the conclusion of the trial is spelled out in s 182A of the Criminal Procedure Code which reads as follows:

> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt
>
> (2) If the court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the court shall record an order of acquittal.

[290] What amounts to 'beyond reasonable doubt' has been stated in the case of *Liew Kaling & Ors v Public Prosecutor* [1960] 1 MLJ 306b as follows:

> That the degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence 'of course it is possible, but not in the lerast probabale' the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[291] What amounts to 'reasonable doubt' was explained in the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 as follows:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of case which after the entire comparison and consideration of all evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge

[292] All the evidence in this case recouped together shows that the prosecution has clearly surpassed the burden placed upon them and puts to shade the saying that dead men tell no tales.

[293] The three dead men and one woman through the evidence led by the prosecution have told a stark tale of debauchery committed by an unscrupulous professional in the guise of the first accused. This rouge professionals are rare and few and their victims are not only the poor and desolate but also the rich and mighty. This case was also a tale of a gruesome plot executed by the first accused and his cohorts with extreme brutality.

[294] The evidence led by the prosecution was sufficient to sustain a charge of murder as defined under s 300(a) of the Penal Code. The only difference is this case was a case like no others as the bodies of the victims were not recovered. The finding of the bodies as I have stated earlier is not a prerequisite to sustain a charge of murder.

[295] There is precedence in the form of the Singapore case of *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 where no body was recovered yet the accused was convicted. Different from the case of *Sunny Ang* where there was not even a trace of the victim, the victims in this case left a trail of evidence in the form of their personal items and blood.

[296] The defence in this case failed to raise even a fanciful possibility let alone a reasonable doubt to counter the evidence led by the prosecution.

ACKNOWLEDGEMENT

[297] Before delivering the final verdict, I thought it proper to make some observation on the conduct of the police investigation in this case. It was obvious that the police had made mammoth effort to investigate this case and to bring the culprits of this horrendous crime to justice. Although the investigation was not text book perfect and it can never be, it was nevertheless a world class investigation carried out with utmost care and precision.

[298] The defence and prosecution teams were one of the best I have come across and both displayed highest attitude of professionalism as well as upheld the best tradition of the Bar. Arguments, submissions and examinations were of the highest quality and greatly assisted me in making a reasoned decision.

FINAL VERDICT

[299] As a final verdict in this case being satisfied that the prosecution had

proven beyond all reasonable doubt all the charges against the four accused, I found all the four accused guilty of all the four charges and sentenced them to death by hanging for each of the four charges.

Appeal dismissed.

Reported by Afiq Mohamad Noor